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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 651

JOHN R. BEVIL, JR., ET AL., *Petitioners*

v.

MARGARET O'BOYLE, ET AL., *Respondents*

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Petitioners submit the following Brief in reply to Respondents' Brief on file herein. Petitioners, in the interest of brevity, will reply to only two of Respondents' arguments in the following order:

(1) Whether the United States District Court had jurisdiction in this cause; and

(2) Whether there was any fraud in the actions of John R. Bevil, Sr. when he secured the two State Court judgments under attack herein.

ARGUMENT

THE DISTRICT COURT WAS WITHOUT JURISDICTION BECAUSE THE MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OR VALUE OF $3000.00 AND THE FACT THAT THE UNITED STATES WAS MADE A PARTY DEFENDANT DOES NOT GIVE THE DISTRICT COURT JURISDICTION

Respondents pointedly ignore the most recent cases decided by this Honorable Court on the question of aggregation of claims to make up the necessary "amount in controversy" to sustain jurisdiction in a United States District Court. With one exception the cases cited by Respondents have one feature in common, they are all cases where the plaintiffs sought to enforce a single title or right in which they had a common or undivided interest. That one exception is *McDaniel v. Traylor*, 196 U.S. 415, 25 S. Ct. 369, upon which Respondents rely heavily to support their argument that their claims may be aggregated for the purpose of establishing the jurisdictional amount. *McDaniel* was cited by this Court in *Sovereign Camp W.O.W. v. O'Neill, et al.*, 266 U.S. 292, 295, 45 S. Ct. 49, 50. There *McDaniel* was characterized as an exception to the general rule that separate and distinct claims, even though they have a common origin, may not be aggregated to make up the necessary "amount in controversy." *McDaniel* and *Woodmen of the World* were subsequently discussed by this Court in *Di Giovanni v. Camden Fire Insurance Association*, 296 U.S. 64, 67, 56 S. Ct. 1, 2. There this Court made it quite clear that the exception to the general rule announced in *McDaniel* and *Woodmen of the World* has its foundation on the theory that under certain circumstances a group may so conspire to enforce separate claims

that their claims become so "tied together" that the aggregate of all claims, rather than the amount of each claim, becomes the amount in controversy.

Petitioners submit that *McDaniel v. Traylor*, supra, does not support the conclusion urged by Respondents and that the instant case is within the rule announced by this Honorable Court in *Clark, Director of Motor Vehicles, et al., v. Paul Gray, Inc., et al.*, 306 U.S. 583; 59 S. Ct. 744.

In an attempt to show that the United States District Court had jurisdiction of the claim asserted herein by A. D. Davies, the Respondents, on page 13 of their Brief, state that at the time the two State Court judgments were rendered "A. D. Davies owned 80 acres valued at $84, a total of $6,720," and they apparently contend that if his claim had such value at the time the judgments of 1945 and 1946 were rendered, that such was sufficient to give the District Court jurisdiction. It is shown that in 1951 Davies conveyed to R. F. Roberts, counsel for Respondents, his claim to the surface estate and 7/16ths of the mineral estate of seven (7) of the eight (8) lots (or 70 of the 80 acres) which Respondents say Davies owned at the time the State Court judgments were rendered. The deed from Davies to Roberts is shown at page 19 of the Appendix to the Petition for Writ of Certiorari. Respondents do not deny this; in fact, they admit it—but they say such fact is immaterial in so far as jurisdictional amount is concerned and contend that the value of Davies' claim at the time such judgments were rendered determines the question of jurisdiction.

Petitioners submit that the value of Davies' claim at the time this suit was filed, and not the value of his claim at the time the State Court judgments were rendered, must

be used in determining jurisdiction. When this suit was filed Davies' claim was limited to the surface estate and mineral estate in and to ten (10) acres and 7/16ths of the mineral estate in and to seventy (70) acres. There is no showing whatsoever that such claim had a value in excess of $3,000.00 when this suit was filed.

If it could be said that the value of Davies' claim when the State Court judgments were rendered was determinative of the matter of jurisdiction it is respectfully submitted that there was no showing at all with respect to value as of such times, that is, in 1945 and 1946. The District Court did not have jurisdiction of the A. D. Davies claim.

On Page 13 of Respondents' Brief the statement is made that Petitioners admit jurisdiction as to the Luckanick Respondents. We disclaim any and all intention of admitting jurisdiction as to such Respondents. On Page 15 of the Petition we simply stated that with possible exception of the claim of Alexander Luckanick et al. the amount or value of the claim of each Respondent, or group of Respondents, was not shown to be such as to invoke the jurisdiction of the United States District Court. There is in evidence an affidavit of Mr. Roberts, counsel for Respondents, that recites the value of the Luckanick claim to be $4,200.00, but there is also in evidence an affidavit made by L. L. Williams reciting the value of the land in the Hawley League to be $30.00 per acre. On the basis of such affidavit the value of the Luckanick claim would be $[illegible]00.00. In any event, it is submitted that there was no showing whatsoever that the claim of any Respondent, or group of Respondents, had a value in excess of $3,000.00 with the possible exception of the Luckanick group.

Respondents make the contention (Page 12 of their Brief) that because they made the United States a party defendant to this cause such fact alone gave the District Court jurisdiction. Respondents cited 28 U.S.C. 901 in their First Amended Original Complaint (Tr. of R. 3) as one of the grounds for jurisdiction in the District Court. 28 U.S.C. 901 presently appears as Section 2410, Judiciary and Judicial Procedure Act, June 25, 1948, Title 28 U.S.C.[1]

We are unable to find any decision of this Court construing that statute; however, the Court of Appeals for the Ninth Circuit has held that Section 2410 does not have the effect of enlarging the jurisdiction of the United States District Courts. In *Wells v. Long et al.* (9 Cir.), 162 F. 2d 842, 844, that Court said:

> "The assumption appears to be that the federal district court is necessarily vested with jurisdiction in every case in which the United States is a party. The assumption is incorrect. Federal district courts have only such jurisdiction as Congress confers. It is true that Congress has conferred jurisdiction on them of all suits brought by the United States, Judicial Code, Sec. 24(1), 28 U.S.C.A. Sec. 41(1), but no like provision has been made as to suits against the government. The purpose of the statute immediately involved (Section 2410, Judiciary and Judicial Procedure Act of June 25, 1948, Title 28, U.S.C.) is merely to waive sovereign immunity from suit in certain types of cases, not to confer jurisdiction on courts to hear and determine such cases in the ordinary sense. It presupposes that the court in which such suit is pending or brought has jurisdiction thereof on grounds independent of the

[1] This statute is copied in the Appendix hereto.

> statute. As already noted, the act gives the United States alone the right of removal to the federal court. Unless the United States invokes the jurisdiction of that court, and it has not done so here, federal jurisdiction can not be predicated merely on the fact that the United States is a party."

The Ninth Circuit reaffirmed this holding in *Seattle Association of Credit Men v. United States* (9 Cir.), 240 F. 2d 906, 908, where the Court said:

> "As we pointed out in Wells v. Long, 9 Cir., 162 F. 2d 842, at page 844, the limited purpose of Sec. 2410 is to waive sovereign immunity from suit, and 'presupposes that the court in which such suit is pending or brought has jurisdiction thereof on grounds independent of the statute.' "

Petitioners submit that the Ninth Circuit has placed the proper construction on Section 2410 and that this statute in no wise enlarges the jurisdiction of the lower Federal Courts. The fact that the United States, at one time, was a party defendant to this suit did not, within itself, vest jurisdiction in the District Court.

It is seriously urged that the District Court was without jurisdiction in this cause with respect to the claim asserted herein by each Respondent, or group of Respondents, with the possible exception of Respondents Alexander Luckanick et al. If this Honorable Court should hold that the District Court had jurisdiction with respect to the claim of Respondents Luckanick et al., then it is submitted that the procedure followed by this Honorable Court in the *Paul Gray* case, supra, should be followed here. In such case this Court said:

". . . Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved . . ."

JOHN R. BEVIL, SR. WAS NOT GUILTY OF FRAUD WHEN HE SECURED THE TWO STATE COURT JUDGMENTS UNDER ATTACK HEREIN

Respondents, at page 34 of their Brief, say: "The Fifth Circuit was correct in holding that these State Court judgments were obtained by fraud on the Court." Petitioners submit that in arriving at such holding the majority ignored the provisions of Rule 244[2], Vernon's Annotated Texas Rules of Civil Procedure, which provides for the appointment of an attorney to defend a suit in behalf of a defendant cited by publication where no answer has been filed and no appearance entered by such defendant. The Court then ignored the fact that such an attorney was appointed in each of the State Court suits. After erroneously assuming that there was a duty on Bevil, Sr. to conduct the defendants' case for them in the State Court, the Court of Appeals then concluded that his failure to do so was fraud.

The majority opinion of the Court of Appeals cited three Texas cases as authority for its holding that Bevil, Sr. was guilty of fraud. In *Davies v. Terry*, 33 Tex. 426, the first of the cases cited, the Supreme Court of Texas merely held that a defendant had a right to rely on a representation by the Court that no civil business would be conducted at that term of Court and that a judgment by default rendered against such defendant during that term could be set aside at a succeeding term.

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[2] Copied in App. to Petition for Writ of Certiorari Page 1

In *Mills v. Baird* (Tex. Civ. App., err. ref.), 147 S.W. 2d 312, cited by the Court of Appeals, a compromise agreement was procured by concealment and misrepresentation of matters of fact as well as of law and the Court properly held that a judgment based on such fraudulently procured agreement could be set aside in a direct attack on such judgment.

In the third case cited by the Court, *Alexander v. Hagedorn*, 148 Tex. 565; 226 S.W. 2d 996, the Court held that a false representation to the trial Court which went to the merits of the case was not such fraud as would permit the judgment to be set aside. The Court said (1002):

> ". . . Judgments are not impeachable for frauds relating to the merits between the parties; . . . all mistakes and errors must be corrected from *within* by motion for new trial, or to reopen the judgment, or by appeal; . . . the fraud which will otherwise relieve must be in some matter *other than the issue in controversy in the action.*"

There is no evidence in the record, and no contention by Respondents, that Bevil did anything to prevent the attorney appointed by the Court in the State Court suits from presenting any defense the defendants therein had. There is no evidence, and no intimation, that Bevil misled such attorney. Respondents' claim of fraud, and the finding of fraud by the Court of Appeals, is not based on any act or omission by such attorney or on any misrepresentation made by Bevil, or his attorney, to the attorney appointed to represent the defendants. The charge of fraud is based solely on the failure of Bevil to introduce in evidence certain instruments which Respondents say would

have shown that Bevil had conveyed the land that Respondents now claim. It is obvious and clear that the three cases cited by the Court of Appeals are no authority for the holding by such Court that there was a duty on Bevil to present the defendants' case for them in the State Court. Bevil was the plaintiff and the State Court suits were adversary proceedings. Likewise, the cases cited by Respondents in their Brief are not authority for their contention that Bevil was guilty of fraud in failing to introduce the aforementioned instruments in evidence on the trial of the State Court suits. Such cases as cited by Respondents are not at all in point and have no application here.

We submit that the authorities, to the contrary, hold that Bevil was under no obligation to introduce the instruments through which Respondents claim and that his failure to do so is not ground for setting aside such judgments.

In *Garcia, et al. v. Ramos, et al.* (Tex. Civ. App., err. ref.), 208 S.W. 2d 111, 112, the Court said:

> "Appellants next contend that they were tenants in common with Appellees' vendors and relied on a full and true disclosure to the Court by them, but, instead, Appellees' vendors perjuriously concealed from the Trial Court the true facts. Failure of an opposite party to furnish evidence to present defendants' defense, or even concealing such defense by committing perjury at the trial, cannot be grounds for setting aside a final judgment."

In *Kelly, et ux. v. Wright, et al.*, 144 Tex. 114, 188 S.W. 2d 983, 985, the Supreme Court of Texas said:

> "One of the two equitable grounds for the bill of review is that respondent in the prior suit knew she

held the land in question only as trustee for petitioners; that she knew she had no title to the land; and that she deliberately and fraudulently withheld such information from the court in the former trial. It is at least a novel contention that one who fails to furnish his adversary with proof of a fact he is disputing in a law suit is guilty of actionable fraud. Even perjury itself is ordinarily not sufficient for setting aside a former judgment."

The correct rule is stated in 23 *Am. Jur.*, Section 92, page 870, where it is said:

"A party to a law suit is not bound to disclose to his adversary facts which tend to defeat or weaken his own right of recovery, and he commits no fraud by remaining silent."

If Bevil had introduced the instruments through which Respondents claim, it is submitted that such instruments would not have shown title in Respondents to the land now claimed by them. Respondents claim certain numbered lots or tracts according to a plat recorded in Vol. 22, page 92, of the Deed Records of Hardin County, Texas. Such plat is reproduced on page 51 of the Appendix to the Petition for Writ of Certiorari in this case (and it is also reproduced in the opinion of the Court of Appeals). The lots or tracts claimed by Respondents are shown on page 12 of the Petition for Writ and the deeds through which they claim purport to convey such numbered lots or tracts according to the plat above referred to. An inspection of the plat will show that it does not contain any numbered lots or tracts corresponding to the numbered lots or tracts claimed by Respondents and purportedly conveyed by the deeds through which Respondents claim. Such

deeds are therefore void and convey nothing. 16 *Am. Jur.* 592, Section 273, wherein it is said:

> ". . . The description in a deed by reference to another instrument can be made certain, however, only by reference to the *very map, plat* or deed referred to in the conveyance" (Emphasis added).

The deeds out of Bevil, which Respondents say it was fraud for him not to introduce in evidence, purported to convey the same numbered lots or tracts as purported to be conveyed by the deeds under which Respondents claim. They also described other numbered lots or tracts shown on the plat. Such deeds described and conveyed by reference to the plat above referred to. With respect to the numbered lots or tracts claimed by Respondents, the deeds out of Bevil were void. It follows that if Bevil had introduced the deeds out of him (to Texas Little Farms Company) and the deeds into Respondents (from Texas Little Farms Company) such deeds would not have shown title out of Bevil with respect to the land claimed by Respondents and would not have shown title into Respondents. How, then, could Bevil be guilty of fraud in not introducing such deeds in evidence?

Under the facts and under the law, John R. Bevil, Sr. comitted no fraud in connection with the prosecution of the State Court suits. The following quotation from Judge Hutcheson's dissenting opinion (page 60 of the Appendix to the Petition for Writ) is, we submit, a correct statement of the law:

> ". . . The applicable statutes and rules governing publication suits specifically provide that plaintiffs are required only to show a prima facie title and no deci-

sion in Texas has ever held, nor under the law could hold, that the failure to offer evidence as to defendants' claim of title constituted fraud."

ERRONEOUS STATEMENTS IN RESPONDENTS' REPLY BRIEF

We have noted quite a few erroneous statements in Repondents' Reply Brief and believe it wise to call attention to some (but not necessarily all) of such statements so that the Court will know that we do not agree with such statements:

(1) On Page 5 of the Reply Brief it is stated that "Respondents, and not Petitioners, have possession of the land." Again, on Page 41 of the Brief it is said that "the record in the case at bar" shows that the Respondents here held possession of the land described in the state court judgments. Such statements are erroneous in that there is no evidence in this case with respect to who has possession of the land or whether anyone has possession of it.

(2) In the last paragraph on Page 40 of the Reply Brief it is stated, in substance, that in making sale of the land "Bevil made another map, extended all of the subdivision lines, and inserted tract numbers . . . and signed this map in his own handwriting. . . ." This is an erroneous statement. There is no evidence in the case that J. R. Bevil ever made such a plat or map, extended subdivision lines, inserted tract numbers and signed such map. There is an Exhibit "L" attached to Plaintiffs' Answer to Defendants' First Amended Supplemental Motion to Dismiss that contains a plat on which numbers have been placed in Block A and on which there appears the name of J. R. Bevil; but there is no proof that

J. R. Bevil extended the lines, inserted the numbers or signed the plat. Such plat does not appear to be of record and there is no explanation by Respondents as to where the plat came from. The statement that J. R. Bevil did these things is entirely erroneous.

(3) On Page 45 of the Reply Brief it is stated that in the management of the two state court suits "these Bevil deeds and releases were suppressed and concealed from the court." This is entirely erroneous if intended as a statement of fact. There is no evidence that such deeds were suppressed and concealed.

CONCLUSION

The fact that Petitioners have not replied herein to some of the arguments advanced by Respondents in their Brief does not mean that Petitioners agree with Respondents in what is said in such arguments. In the interest of brevity, we have answered only such of the arguments that we thought required answering.

Petitioners submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, William Hamlet Blades, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of February, 1959, I served copies of the foregoing Reply to Respondents Brief in Opposition on Respondents by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their Attorneys of record as follows:

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WILLIAM HAMLET BLADES

APPENDIX

Federal Statute, Section 2410, Judiciary Procedure Act of June 25, 1948, Title 28, U.S.C.:

Section 2410. *Actions affecting property on which U. S. has lien.*

(a) Under the conditions prescribed in this section and Section 1444 of this Title, for the protection of the United States, the United States may be named a party to any civil action or suit in any District Court, including the District Court for the Territory of Alaska, or in any State Court having jurisdiction of the subject matter to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.[1]

(Note: Subdivisions (b), (c) and (d) of Section 2410 are not pertinent and are not copied here.)

[1] Subdivision (a) of Section 2410 was amended in 1958, but is